Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

CELLULAR PHONE TASKFORCE,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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September, 2000

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37 pp

QUESTIONS PRESENTED

1. Whether an agency other than the Environmental Protection Agency can be excused in its rulemaking from compliance with National Environmental Policy Act procedures by use of the "functional compliance" doctrine.

2. Whether, consistent with both the Administrative Procedures Act and the National Environmental Policy Act, an agency without expertise in health matters can engage in rulemaking without submitting significant health-related comments and evidence to the federal agencies concerned with health and safety matters, and do so on the grounds that, despite its lack of expertise, it does not believe the comments or evidence significant enough for such a submission.

3. Whether, consistent with the delegation provisions of the federal Constitution, Congress can delegate to a federal agency the power to set national standards for a pervasive industry, the effects of whose operations are experienced by all, without choice, with entirely standardless delegation legislation.

4. Whether federal agency rulemaking, mandated by an act of Congress, which preempts local governmental zoning decisions related to health and safety, constitutes a "program or activity" under the Rehabilitation Act, requiring adherence to its provisions.

PARTIES TO THE PROCEEDING

In this Court, the Petitioner filing this Petition is the Cellular Phone Taskforce, a non-profit, public interest corporation incorporated in New York.

The parties plaintiff to the proceeding in the Court of Appeals were: CELLULAR PHONE TASKFORCE, AD-HOC ASSOCIATION OF PARTIES CONCERNED ABOUT THE FEDERAL COMMUNICATIONS COMMISSION RADIO FREQUENCY HEALTH AND SAFETY RULES, DAVID FICHTENBERG, CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, JOHN BARDIS, ERICA ZWEIG, of Telecommunications Master Plan Coalition of San Francisco, CHRISTOPHER BEAVER, of Noe Valley Families Against the Antennas, MAJOR BELKIN, DONNA CASEY, MAGGIE FOX, EILEEN LAHEY, MARK R. SHIRLEY, M. SUE STORM, of Healthy Home Alliance, JOSEPH BOHACZ, CANDICE BROWN, GARY BROWN of Families for Appropriate Cellular Tower Siting, SUSAN CLARKE, of Environmental Health Advocacy League, MARY-CROUGHAN MINIHANE, LIBBY KELLEY, SILVIA M. SIEGEL, ANNEGRET C. TOPEL, of Citizens of Marin for Sensible Communications Planning, JERRY DAVIS, JEAN FOLEY, of Ulysses Citizens for Responsible Technology, HOLLY A. FOURNIER, Selectboard Member of Charlotte, VT and co-chair of Citizens for the Appropriate Placement of Telecommunications Facilities, JULIANNA FREE, of Lifeline Resources, Inc., ANNE GALLOWAY, of Hardwick Action Committee, DAVID GELL, RICHARD GIANATTIASIO, of Northboro Residents for Responsible Tower Siting, DALE A. NEWTON, JANET R. NEWTON,

PARTIES TO THE PROCEEDING – Continued

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companies nor non-wholly owned subsidiaries to be listed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Cellular Phone Taskforce respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in these consolidated cases (Nos. 97-4328(L), 98-4003(Con), 98-4005(Con), 98-4025(Con), 98-4122(Con)).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 205 F.3d 82 (2d Cir. 2000) and appears in the appendix of petitioners Citizens for the Appropriate Placement of Telecommunications Facilities, et al., hereafter cited simply as "App.," but appearing therewith, at A-1-22. The unpublished opinion denying Cellular Phone Taskforce's petition for rehearing, electronically reported at 2000 WL 862305, appears at App. A-23-25. An order denying a second petition for rehearing by Communications Workers of America appears at App. A-26.

The two orders of the Federal Communications Commission disposing of its rulemaking, reported at 11 FCC rcd 15123 (1996) and 12 FCC rcd 13494 (1997), have been lodged with the Clerk of this Court because of their significant length.

The letters from Richard M. Smith of the FCC, purporting to respond to and dispose of the appeal regarding petitioner's Rehabilitation Act complaint, dated July 14, 1997 and Feburary 2, 1998, appear at App. A-43-44 and App. A-49-52.

JURISDICTION

The Court of Appeals entered its Opinion on February 18, 2000; its first order denying a petition for rehearing on June 6, 2000; and its second order denying a petition for rehearing on June 15, 2000. Pursuant to Supreme Court Rule 13, this Petition is filed within 90 days of that order. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are included in the aforementioned appendix filed with the petition of petitioners Citizens for the Appropriate Placement of Telecommunications Facilities, et al.

STATEMENT OF THE CASE

A. Factual and Procedural Background

The Cellular Phone Taskforce consists of individuals concerned about the radiation emitted from cellular telephone (and similar Radio Frequency – "RF") transmitting facilities. Many are electrically sensitive, meaning hypersensitive to non-ionizing (*i.e.*, non-nuclear) radiation. They are trapped, like Alice, in a Wonderland in which they feel everyday non-thermal effects of the RF emissions – some to the extent of having been driven literally from their city homes to rural locations lacking such emissions – and yet in which the non-health-related regulatory agency to which their health has been entrusted

ignored the evidence of their travails, failed to present that evidence to its sister agencies which are concerned with health and safety, and had Congress and the FCC preempt their local governments from decisions which might protect their health. Instead, they had to sit by and watch while the FCC relied on an industry-dominated organization's finding that there was "no reliable scientific data" connecting non-thermal exposure to radio frequency transmissions and human health. App. A-9.

Although petitioner does not agree in every particular with the background facts described by the Court of Appeals, and reserves the right to challenge that court's findings should this petition be granted, petitioner commends to the Court, for the purposes of this petition, the factual background set forth both in the lower court's opinion, App. A-3-5, and in the Petition of the Citizens for the Appropriate Placement, etc. Accordingly, the discussion here will endeavor to be brief.

In 1993, the FCC sought to update its 1985 guidelines for RF radiation from its licensees' transmitting facilities, and issued proposed new guidelines for notice and comment. *See* Notice of Proposed Rule Making: In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 FCC rcd 2849, 1993 WL 757412 (1993), cited in Court of Appeals' opinion at App. A-4. After receiving "submissions," App. A-4, from health-related sister agencies, including the Environmental Protection Agency ("EPA"), the Food and Drug Administration ("FDA"), the Occupational Safety and Health Administration ("OSHA") and the National Institute for Occupational Safety and Health ("NIOSH"), the

FCC adopted standards which combined standards recommended by two industry-dominated groups, the American National Standards Institute ("ANSI") and the National Council on Radiation Protection and Measurements ("NCRP"). One aspect of this rule-setting round is most important for this petition: There is no evidence on the record, nor has the FCC ever affirmatively asserted, that it ever specifically sought review by the health-related agencies of the comments submitted to it during the first rulemaking round regarding RF effects upon the electrically sensitive and others.

Meanwhile, Congress, anxious to encourage nationwide access to cellular and other new communications devices, passed the Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 ("TCA"). The TCA instructed the FCC to finish its rulemaking regarding the siting of and permissible emission levels of cell-phone and other wireless service transmission facilities. It also included three provisions which are the subject of constitutional objections raised below and in this petition. It ordered local governments to act on any request for authorization to place transmitting facilities within a "reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii), App. A-29; it forbade local governments from taking any action which had the effect of prohibiting the provision of personal wireless services, 47 U.S.C. § 332(c)(7)(B)(i)(II), App. A-29; and it preempted state and local governments from regulating the placement of such facilities on the basis of the environmental effects of RF radiation as long as it was within FCC guidelines. *See* 47 U.S.C. § 332(c)(7)(B)(iv), App. A-30. The FCC issued the guidelines within the mandated time limits. The guidelines

included some of the substantive emissions standards challenged in the court below, and also adopted the TCA's prohibition of state and local governments' denial of siting applications on the basis of environmental concerns, which the order interprets to include health effects. *See* Report and Order ("First Order"), 11 FCC rcd 15123 (1996), lodged with the Court, at 60-61, ¶ 166.

The various petitioners below, among others, sought reconsideration of the First Order, and submitted literally thousands of pages of evidence concerning the non-thermal effects of RF radiation on humans. Again, there is nothing on the record to indicate that the FCC affirmatively sought comment on this evidence from its sister health-related agencies. Indeed, in both the Second Order which resulted from the reconsideration round, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking ("Second Order"), 12 FCC rcd 13494 (1997), lodged with the Court, and in the court below, the FCC simultaneously denied that it had the expertise to evaluate the health-related evidence and yet asserted that such an action was unnecessary because the new evidence submitted during the reconsideration round was not any different than that which had been submitted during the initial round.[1] So a "non-expert" agency

---

[1] During oral argument before the Second Circuit, the following colloquy took place between the appellate panel and the attorney for the FCC:

> JUDGE WALKER: Can you address the other point that was made here about the agency's reconsideration of the other health related agencies' view points and the environmental agencies' view points?

– one with the divided missions both to promote the industry and to safeguard the population – arrogated

---

> MR. MARCUS: I think that the agencies bent over backwards to consider the other health and safety –
>
> JUDGE WALKER: They're [petitioners are] saying on reconsideration that wasn't the case.
>
> MR. MARCUS: Okay. Well, for one thing, the agency had already consulted extensively with EFA [sic], FDA, OSHA, NIAC [sic]. The agency had developed its standards based on the recommendations of two expert scientifically loaded standard-setting bodies.
>
> The agency took under advisement the request that it consult more with the health and safety agencies, and in the Reconsideration Order it said that we decline to do that. I'll find that for you in a minute.
>
> JUDGE NEWMAN: You know that they did. The question is: Having disclaimed their own expertise, why wasn't it arbitrary not to go back to the expert agencies with what is alleged to be substantial added evidence?

Transcript of Oral Argument, April 5, 1999 ("Tr.") at 38-39. After further similar exchanges, the court ended up giving the answer which it adopted in its opinion:

> JUDGE SACK: When it's a question of health impacts, why don't you necessarily go back to the agencies that deal with health impacts?
>
> MR. MARCUS: Well, we did go to the agencies that dealt with health impacts. We went and we discussed it with them extensively.
>
> JUDGE SACK: Not on the reconsideration?
>
> MR. MARCUS: Not on the reconsideration because by that point we had consulted with these agencies extensively.

to itself the right to judge whether evidence regarding health and safety was important enough to submit to the agencies with the expertise to evaluate it. Lewis Carroll could not have imagined a more bizarre (and unfortunate) result.

B. The Rehabilitation Act Claim

In addition to filing a timely appeal of the FCC's rules in the Second Circuit, petitioner also filed a discrimination claim against the FCC under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, *et seq.* Many of petitioner's members suffer from a medical condition which causes hypersensitivity to electromagnetic, including RF, radiation. Petitioner alleged that the FCC, by conducting a rulemaking without regard to petitioner's members' disabilities, had discriminated against them on the basis of their disability. This claim and a subsequent appeal were summarily denied by the FCC, acting inappropriately through a staff member, claiming that its rules could not be discriminatory because they have no

---

> JUDGE WALKER: Does your argument have to be that the materials submitted on reconsideration were not materially different from the materials that you received in the first instance?
>
> MR. MARCUS: That's what the Commission basically found.

Tr. at 44-45. The flaw here, as noted, is that the Commission did not have the expertise to make the judgment regarding the materiality of the submissions on the reconsideration round any more than it had the expertise to evaluate the substantive importance of that evidence.

"effect" until implemented by the FCC's licensees. Letter of Richard M. Smith, February 2, 1998, App. A-49-52.

C. The Court of Appeals' Opinion

The Court of Appeals had jurisdiction under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) because petitioner petitioned that court to review a final order of the FCC; and additionally, under 29 U.S.C. § 794a(a)(2) and 42 U.S.C. § 2000d-2 with respect to petitioner's discrimination complaint.

The Court of Appeals rejected all of the various petitioners' claims, ruling, *inter alia*, that: (1) the FCC did not, in its First Order, violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, by arbitrarily and capriciously failing to adequately consider the evidence of harmful effects from non-thermal levels of radiation and failing to account for the cumulative effects of radiation in creating categorical exemptions for certain facilities for routine environmental assessment, *see* App. A-7-12, A-15-16; (2) the FCC in its rulemaking did not have to comply with relevant provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, and the rules promulgated thereunder by the Council on Environmental Quality ("CEQ") by failing to complete either an Environmental Impact Statement ("EIS") or an Environmental Assessment ("EA") followed by a finding of no significant impact ("FONSI"), *see* App. A-16-19; (3) the FCC did not err in its interpretation of the Act in such a way as to preempt local governments from zoning regulation of transmission sites on the basis of health and safety, *see* App. A-19-21; and (4) the Tenth

Amendment did not preclude the federal preemption of local authority, *see* App. A-21.

D. The Court of Appeals' Opinion on Reconsideration

On reconsideration, the Court of Appeals reversed its earlier rejection on exhaustion grounds of petitioner's ADA and Rehabilitation Act claims, App. A-6, ruling that petitioner had done all it reasonably could to secure a final agency determination, App. A-24. On the merits, however, the court again rejected the claims. Regarding petitioner's claim that the agency violated Title II of the ADA by forcing state and local governments to discriminate against electrically sensitive people, the court held that the FCC could not itself be made liable under the ADA, *see* App. A-25. Regarding petitioner's Rehabilitation Act claim, the court held that the Guidelines, by allowing proliferation of the damaging towers, did not thereby deny electrically sensitive people the benefits of a "program or activity" of the FCC. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT, CONFLICTING WITH ALL OTHER COURTS WHICH HAVE CONSIDERED THE ISSUE, CREATED A "FUNCTIONAL COMPLIANCE" WAIVER OF THE NEPA REQUIREMENT OF AN EIS OR EA FOR RULEMAKING BY A NON-ENVIRONMENTAL AGENCY

The Court of Appeals recognized that both NEPA and the rules of the CEQ require agencies to prepare an EIS or an EA, followed by a FONSI, for rulemaking such

as that involved here, and that the FCC admittedly did not do so. App. A-16-17. Nevertheless, the court, in an unprecedented broadening of the concept, held that the FCC had engaged in functional compliance. In applying functional compliance to a non-environmental agency, the Second Circuit decision conflicts with every other court that has considered the matter.

Even the case cited by the Court of Appeals makes explicit the limitations on the doctrine. The Court of Appeals justified its application of the functional compliance test by quoting a sentence from the penultimate paragraph of *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973):

> " '[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient.' " App. A-17.

Tellingly, however, the court in this case not only ignored the language at the beginning of the above-quoted sentence – "where an agency is engaged primarily in an examination of environmental questions," which the FCC surely is not – it also ignored the crucial next two sentences:

> "We are not formulating a broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies. Instead, we delineate a narrow exemption from the literal requirements for those actions which are undertaken pursuant to sufficient safeguards so that

> the purpose and policies behind NEPA will necessarily be fulfilled." *Environmental Defense Fund v. EPA, supra,* 489 F.2d at 1257.

See also Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 387 (D.C. Cir. 1973) ("we establish a narrow [functional compliance] exemption from NEPA, for EPA determinations. . . . NEPA must be accorded full vitality as to non-environmental agencies. . . . ")

Indeed, petitioner's research has failed to find *any* case in which a non-environmental agency was allowed to avoid an EIS or EA by virtue of functional compliance. To the contrary, even natural resource agencies have been denied functional equivalence and have been required to comply with NEPA, *e.g., Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996) (Fish and Wildlife Service must comply with both NEPA and Endangered Species Act "ESA"); *Texas Committee on Natural Resources v. Bergland,* 573 F.2d 201 (5th Cir. 1978) (Forest Service must comply with NEPA). Up until the Second Circuit's opinion in this case, it appears that every case that has considered granting a non-environmental agency functional compliance status has refused to do so, *e.g., Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n,* 869 F.2d 719 (3rd Cir. 1989); *WATCH v. Harris,* 603 F.2d 310 (2nd Cir. 1979) (H.U.D.).

The importance of this is manifest: If the Second Circuit's expansion of functional compliance is allowed to stand, it both creates a conflict with the cases cited above and, more importantly, creates a loophole in the requirements of NEPA that swallows the rule.

II. THE FCC VIOLATED BOTH NEPA AND THE APA IN REFUSING TO ACTIVELY SEEK HEALTH-AGENCY REVIEW OF THE EVIDENCE CONCERNING THE NON-THERMAL HEALTH EFFECTS OF CELL-PHONE TRANSMITTER RADIATION

Federal agencies are required to consult with agencies that have special expertise with respect to any environmental impact involved. 42 U.S.C. § 4332(C), App. A-32. As noted in the Statement of the Case, *supra*, the FCC admitted that it failed to refer to health-related agencies the voluminous evidence submitted, regarding RF effects on the electrically sensitive and others, in the reconsideration round. As a matter of fact, there is nothing on the record, nothing, that shows that the FCC actively sought health agency review of that evidence at all during rulemaking, except for early "consultation" immediately following issuance of the 1993 notice of proposed rule-making. Indeed, the FCC ignored a statement by NCRP that the "existence of non-thermal effects 'is clouded by a host of conflicting reports and opinions.' " Quoted in Court of Appeals' Opinion, App. at A-9. Similarly, in its Second Order, the FCC claimed that "[i]t would be impracticable for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and then adopt stricter standards than those advocated by federal health and safety agencies." Second Order, lodged with Court, at 12, ¶ 31, quoted by Court of Appeals at App. A-9. In fact, however, in the face of "conflicting reports and opinions" and its own admitted lack of expertise, the FCC declined to submit the host of

evidence submitted on this subject to the health-related agencies. Its failure so to do was arbitrary and capricious under both the APA and NEPA.

A. The Administrative Procedure Act Violations

The APA's guarantee of the right of the public to comment on proposed rules " 'is meaningless unless the agency responds to signficant points raised by the public.' The need for discussion is paramount precisely because evidence was presented in support of, and in opposition to, most of the proposals." *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1217 (D.C. Cir. 1983), quoting *Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979). Yet that is what the FCC did here. For example, in ¶ 11 at page 6 of the First Order the FCC admitted that "more than 100 parties, including . . . individuals, submitted comments," yet in ¶¶ 15-27, at pages 7-12 of that order, only comments by industry and agencies are described. In ¶¶ 25-28 of the Second Order, at 10-11, the FCC acknowledges the concerns of several of the petitioners below and the evidence submitted, citing in particular petitioner's claims that the emissions levels ignored those who were electrically sensitive, and that " 'perhaps 2%' " of the population were susceptible to becoming electrically sensitive. Second Order, at 11, ¶ 26. Similarly, Dr. Marjorie Lundquist "suggests" that while the existence of non-thermal effects is controversial, " 'the scientific consensus is swinging in favor of their existence.' " *Ibid.* Moreover, Dr. Lundquist maintained that the 1992 ANSI/IEEE guidelines relied upon by the

FCC were "not consistent with electromagnetic field theory, lack a sound scientific basis and may, therefore, be presumed 'to be inadequately protective of public health.' " *Id.* at ¶ 27. Yet in ¶ 111, at 45, the Second Order states: "There is no evidence to suggest that transmitters or facilities that comply with our guidelines will cause adverse health effects." This from an agency that both disclaimed expertise and failed to seek on the reconsideration round expert agency comment on the very evidence it rejects.

In *Action on Smoking and Health v. C.A.B., supra,* the court rejected as arbitrary and capricious the agency's failure to consider the effects of passive smoking on health because "the Board found that '[t]he evidence of a link between "passive smoking" and cancer is . . . slight and controversial.' " *Id.* at 1218. Yet that is precisely what the FCC did here. The Court of Appeals' finding in this case that the FCC's failure to consider or to seek guidance from the expert agencies on the evidence of dangerous RF effects, no matter how slight or controversial it was, was not arbitrary and capricious, is in direct conflict with these aforecited D.C. Circuit rulings.

The Court of Appeals' holding in this case, which approved the FCC's APA errors, was also in conflict with its sister circuit's ruling in *National Ass'n of Broadcasters v. FCC,* 740 F.2d 1190, 1211 (D.C. Cir. 1984), which noted that "an incremental approach to agency decision-making is least justified when small errors in predictive judgments can have catastrophic effects on the public welfare. . . . " Yet in this case, petitioners and many others before the FCC and the Second Circuit fairly screamed

that the transmitter emissions had profound and deleterious effects on their health. For the FCC to have eschewed serious health-agency evaluation of these claims, while simultaneously disclaiming its own expertise, was the very model of arbitrary and capricious agency rulemaking.

B. The NEPA Violations

As noted above, there is no evidence that the FCC specifically submitted to the health-related agencies the comments it received both before and after the First Order raising the issue of non-thermal harmful effects from cell-phone transmitters operating under its proposed and adopted guidelines. As also noted above, there is affirmative evidence, at oral argument and in the Second Order, that the FCC at minimum failed to submit that evidence or discuss it with the relevant agencies on the reconsideration round. This failure is arbitrary and capricious, and contrary to the procedural requirements of NEPA, 42 U.S.C. § 4332(C), App. A-32, and the mandate therein to comply with NEPA "to the fullest extent possible."

> "When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures [i.e., an EIS]. Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its

> impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation of additional data."

Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir. 1980).

In this case, the Court of Appeals' finding that both the FCC's First and Second Orders functionally satisfied NEPA requirements is contradicted by the FCC's failure to consult with the expert agencies in any meaningful way after 1993 and in particular on the reconsideration round, especially in light of the FCC's admitted lack of expertise to perform the reasoned evaluation under the factors as set forth in *Warm Springs, supra*.[2]

NEPA also requires an agency to evaluate the cumulative impacts of a project. 40 CFR § 1508.27(b)(7).[3]

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[2] There are situations which justify a court's utmost deference to agency determinations. Such situations arise in cases which address agencies dealing with issues within their areas of expertise at the frontiers of science, *e.g., Baltimore Gas & Elec. v. Natural Resources Defense Council*, 462 U.S. 87, 104, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). Such deference is unwarranted where the issue is outside the scope of the agency's expertise.

[3] 40 CFR § 1508.27 defines "significantly" for purposes of NEPA, and provides, in relavant part:

> "*Significantly* as used in NEPA requires considerations of both context and intensity:
>
> . . . (b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

When there is scientific uncertainty regarding significant adverse impacts, the agency must either obtain the information to resolve the uncertainty or evaluate that uncertainty using a worst case analysis. 40 CFR § 1502.22.[4] The FCC's failure to reconsult with the expert

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> . . . (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."

[4] 40 CFR § 1502.22, concerning incomplete or unavailable information, provides in relevant part:

> "(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
>
> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. *For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is*

agencies despite its own lack of expertise highlights the arbitrary and capricious aspect of its decision and casts additional doubts on the validity of the required cumulative impacts analysis and worst-case analysis.

III. THE TELECOMMUNICATIONS ACT, § 704(b), CONSTITUTES AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY TO THE FCC BECAUSE THE TCA LACKS AN INTELLIGIBLE PRINCIPLE TO WHICH THE AGENCY IS DIRECTED TO CONFORM

> "The non-delegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government. The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' . . . So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Mistretta v. United States*, 488 U.S. 361, 371-372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928).

The TCA is a "forbidden delegation of legislative power" because it lacks "an intelligible principle." *Ibid.*

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low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." (Emphasis added.)

This improper delegation is in violation of Article 1, Sec. 1, and Article 1, Sec. 8, para. 18 of the Constitution, App. A-28, as interpreted by this Court in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935).

The delegation in the TCA simply states:

> "Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." § 704(b), App. A-31

This Court has on occasion approved delegations of power which have been less than models of clarity. In *American Power & Light Co. v. SEC*, 329 U.S. 90, 104, 91 L.Ed. 103, 67 S.Ct. 133 (1946), this Court explained that certain seemingly vague delegations "derive much meaningful context from the purpose of the Act, its factual background and the statutory context in which they appear." Similarly, in *Lichter v. United States*, 334 U.S. 742, 783, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948), this Court upheld delegation of authority in light of pre-existing administrative practice.[5]

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[5] Neither of the two cases relied on by the FCC in its brief below are on point. *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) and *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S.Ct. 437, 84 L.Ed. 656 (1940) support the broad delegation of authority to the FCC (under The Communications Act of 1934) to issue or revoke licenses that would serve the "public interest, convenience, or necessity." The Congressional concern behind the 1934 legislation was expressly to avoid, in the absence of governmental control, monopolistic domination in the

In this case, there is no such saving principle, and Congress failed to provide even a hint of a standard by which the FCC was to formulate its rules. Nor does the legislative history of the TCA provide any assistance. There was no floor debate which clarifies what standards or principles the FCC should use. Neither was guidance provided to the FCC as to how to balance its new responsibility in health and environment with its other mandates which might conflict – mandates to promote advanced technologies and universal service.[6]

The D.C. Circuit has recently ruled that Sections 108 and 109 of the Clean Air Act, as construed by the EPA, effect "an unconstitutional delegation of legislative power" because the agency had "articulated no intelligible principle" in promulgating air quality standards. *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1033

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broadcasting field. *Pottsville Broadcasting Co., supra* at 137. The broad delegation of authority that was upheld in these two cases has no bearing on the impermissibility of the scope of authority in the TCA, which had the effect not of protecting the public from industry monopoly but of a broad delegation to promote an industry without the hindrance of protective public health standards or the regulatory rights of the states. The delegation in these cases was also within the FCC's area of expertise and administrative practice.

[6] These mandates are found in several laws. "It shall be the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157(a). "Access to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2). And in 47 U.S.C. § 309(j)(3)(D), concerning competitive bidding for licenses or permits, the FCC is directed to promote objectives which include "efficient and intensive use of the electromagnetic spectrum."

(D.C. Cir. 1999), *cert. granted*, ___U.S.___, 120 S.Ct. 3129, 147 L.Ed.2d 231 (2000). The D.C. Circuit found that "the standards in question affect the whole economy, requiring a 'more precise delegation than would otherwise be the case.' " *Id.* at 1037, quoting *Schechter Poultry, supra*, at 553. It is noteworthy that this invalidated delegation fell within the implementing agency's area of expertise, yet the Second Circuit in this case validated Section 704's bare-bones delegation which required guidelines at least partially outside the FCC's area of expertise. *See* App. A-21 (rejecting petitioners' remaining constitutional claims as without merit).

This case is reminiscent of *Schechter Poultry, supra*, where Congress gave sweeping power over the nation to "codes of fair competition" supplied to the President by trade or industry associations. 295 U.S. at 529. Such a delegation, the Court held, was "unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.* at 537. In the instant case, Congress, without other instruction, told the FCC to complete a rulemaking in which that agency had already proposed to adopt either the 1992 ANSI standard or that of another private organization, the NCRP. First Order, at 5, ¶ 10, and 6, ¶ 12. The rulemaking was originally designed merely to comply with NEPA, as to when the FCC's licensees would have to prepare an EA. First Order, at 3-4, ¶ 6. But § 704(a) of the TCA gave these rules new sweeping power over the nation:

> "No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv), App. A-30.

The standardless delegation approved by the Court of Appeals in this case is all the more constitutionally suspect for its granting to a non-health-related agency powers to regulate in an area so directly related to health. Seldom has a Congressional grant of legislative authority to an executive agency been so sweeping, so brief, and so out of context with the agency's other enabling legislation. The guidance of this Court is needed as to whether a delegation of power to an executive agency in a field so far removed from the agency's expertise, without any other guidance, which has both economic and environmental impacts on every single municipality in the United States, satisfies the nondelegation test articulated in *Mistretta, supra*, or whether, " 'If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject.' " *Hampton Jr. & Co., supra*, 276 U.S. at 406, quoting *State ex rel. Railroad & Warehouse Comm'n v. Chicago, M. & St. P. R. Co.*, 38 Minn. 281, 301, 37 N.W. 782 (1888).

IV. THE SECOND CIRCUIT'S REJECTION OF PETITIONER'S CLAIM UNDER THE REHABILITATION ACT CONFLICTS WITH OTHER CIRCUITS' DEFINITIONS OF 'PROGRAM OR ACTIVITY' AS INCLUDING ZONING

In its opinion on rehearing, the Court of Appeals rejected petitioner's complaint under the Rehabilitation Act ("RA"), 29 U.S.C. § 701, *et seq.*, on the grounds that the RA did not apply because electrically sensitive people were not being excluded under the FCC's First or Second Orders from a "program or activity" of the FCC. *See* App. A-25. In doing so, the Court of Appeals ignored and conflicted with ample authority from other circuits (and within its own) that zoning decisions constitute a "program or activity."[7]

In *Bay Area Addiction Research v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999), the Ninth Circuit held that zoning constitutes a program or activity under the Rehabilitation Act. The court went on to state "The Rehabilitation Act and the ADA apply to zoning because zoning 'is a normal function of a governmental entity.' (Citations omitted.)" *Ibid.* In *Innovative Health Systems v. City of White Plains*, 117 F.3d 37, 49 (2nd Cir. 1997), the Second Circuit held that a claim was cognizable under the Rehabilitation Act based on the appellees having been denied the benefit of a zoning decision without regard to the

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[7] It should be noted that the Court of Appeals' decision on rehearing did not address the issues of whether electrically sensitive persons are "otherwise qualified individual[s] with handicaps" under 29 U.S.C. § 794(a), App. A-33. Accordingly, for purposes of this petition, that issue is not before this Court.

disabilities of the IHS's clients. Thus, to the extent that the TCA and the Second Order preclude zoning decisions on the very issues that affect the electrically sensitive, they constitute zoning decisions which are, therefore, subject to the Act. Indeed, in drafting its own rules to implement the RA, the FCC itself also clarified that "the Commission must comply with these non-discrimination requirements when establishing safety standards for the operations of licensees." Report and Order, 2 FCC rcd Vol. 8 at 2203, App. A-38.

The Court of Appeals' holding that the RA did not apply in this case also had the effect of rejecting petitioner's claims that the FCC's treatment of petitioner's RA complaint amounted to wholesale violations of its own rules and the rules promulgated under the RA. The FCC is required to accept and investigate all complaints within its jurisdiction. 47 CFR § 1.1870(d)(1), App. A-36. The decision regarding the investigation of the complaint must include findings of facts and conclusions of law and a notice of the right to appeal. 47 CFR § 1.1870(g), App. A-37. An appeal will not be heard by the person who made the initial determination on the complaint, 47 CFR § 1.1870(i), *ibid.*; Report and Order, *supra*, at 2208, App. A-39. An appeal will be decided within 60 days. 47 CFR § 1.1870(j), App. A-37. In this case, the FCC failed to investigate petitioner's complaint; failed to include findings of facts, conclusions of law and a notice of the right to appeal the FCC's response to the complaint; failed to have a different person handle the appeal; and delayed 116 days in responding to the appeal which was wrongfully denied. *See* Complaint filed on February 3, 1997, App. A-40-42; Letter response by Richard M. Smith, dated

July 14, 1997, App. A-43-44; the Appeal filed on October 8, 1998, App. A-45-48; and the FCC's letter response by Richard M. Smith dated February 2, 1998, App. A-49-52. Simply put, the Court of Appeals' decision precluding application of the RA to the rulemaking at issue here had the effect of gutting both the RA and the regulations promulgated to enforce it.

V. THE QUESTIONS PRESENTED ARE IMPORTANT

As suggested by the fact that at least three, and perhaps more, separate petitions for certiorari will be filed in this case, its impacts are as broad as the Court of Appeals' findings were in error. At the level of administrative jurisprudence, the lower court's opinion conflicts with numerous cases of its own, its sister circuits, and this Court, on constitutional, statutory, and regulatory issues. This case raises issues, some of them covered in our co-petitioner's petitions, concerning the Tenth Amendment, NEPA, the Rehabilitation Act, the APA, and congressional delegation of power. It is hard to imagine a case more bristling with issues for this Court's resolution and guidance.

The legal discussions, however, too easily mask the underlying human dimension of this tragic exercise in technological advancement. The Court of Appeals' decision sanctioned Congress's and the FCC's preemption of local control over, and ignored real evidence concerning, the actual dilatory health effects of widespread cellular phone transmission on a portion of the population who have been impacted beyond repair. The electrically sensitive have been by these rulings cast out both from their

homes and from the halls of their government's decision-making. This result should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 2000